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Religion in Austria is peer-reviewed

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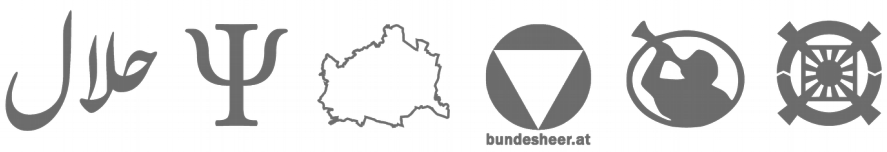
(editors)

Religion in Austria

Volume 3



PRAESENS VERLAG

Published with support from the
Kulturabteilung der Stadt Wien, Forschungs- und Wissenschaftsförderung
and the Research Platform Religion and Transformation in Contemporary Society

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Bibliographic information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at http://dnb.dnb.de

ISBN 978-3-7069-0955-6

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Book Reviews

Diskriminierung aus religiösen Gründen.

Edited by Christian Brünner. Schriftenreihe Colloquium, Band 19. Wien: Verlag Österreich, 2009. Pp. 181. ISBN: 978-3-7046-5339-0. €29.00

Brigitte Schinkele

The present volume includes several lectures given at a symposium at the University of Vienna on December 5, 2008, organised by the Forum Religious Freedom Europe (*Forum Religionsfreiheit Europa* or *FOREF*). Focus has been placed on the treatment of religious minorities, especially the so-called New Religious Movements, the European anti-discrimination law, and discrimination on religious grounds from an international perspective. The Appendix includes a bibliography and a list of legal sources and other relevant national and international documents, as well as a few selected decisions of the European Court of Human Rights (ECHR) and the much-debated German Constitutional Court's judgment from 1995 concerning the exhibition of crosses in classrooms.

The book is introduced with an editorial by Gerson Kern (p. 11) and a preface by Reinhard Kohlhofer (pp. 13-17), followed by a short contribution from the editor, Christian Brünner, entitled "Religious Freedom – An Endangered Good also in Austria" (pp. 19-26). Brünner criticises the different treatment of legally recognised religious communities with public law status as well as State-registered religious confessional communities, in connection with the fact that not all religious groups have a fair opportunity to apply for legal recognition. Indeed, the whole legal system in Austria would have to be scrutinised in order to determine whether the consequences emanating from legal recognition can be deemed legitimate on objective and reasonable grounds. They could only be justified if no difference in treatment could be provided as far as legal positions are concerned, which are directly derived from the fundamental right of religious freedom. Otherwise, they represent non-objective infringements of the guarantees of fundamental rights and should be abolished. Unfortunately, for the time

being, there is not the slightest indication that this situation could be improved, either with regard to the legislator, the Constitutional Court, the High Administrative Court, or even the ECHR. This question, therefore, remains the most crucial issue concerning the Austrian law on religion (cf. Kalb, Potz, and Schinkele 2009: 400-432).

More specifically, Brünner deals with the establishment of a Federal Office for Information on Sect-Issues (*Bundesstelle für Sektenfragen*) in 1998.[1] It is the Office's task to document and inform the public about dangers that might arise from 'sects' and 'sect'-like activities. The movements in question are described by the legislator as communities referring to religious or philosophical beliefs from which risks might emerge concerning: the life or the physical health of people; the free development of the human personality, including the freedom of entering and leaving religious or philosophical communities; the integrity of family life; the property or financial autonomy of people; and the free mental and physical development of children and juveniles, provided that a well-founded suspicion is available. Brünner observes several unconstitutionalities. His totally negative assessment, however, seems to go too far, notwithstanding a quite remarkable deficiency regarding judicial relief that is considered to be the most problematic issue of this law. Although the *Bundesstelle* explicitly acts within the non-sovereign sphere of state administration, the Act on the Liability of the State for a Public Officer is to be applied, rather than the civil law provisions concerning compensation for damage. As a consequence, the right to require somebody to revoke a defamatory allegation or to refrain from it is excluded and, consequently, those aspects that are almost exclusively relevant to such religious movements. Apart from this insufficiency, the legislator goes to great effort to take into account the fundamental rights of the groups concerned, especially the right to data protection. The *Bundesstelle* is explicitly bound to carefully consider the state's neutrality pertaining to religious matters and the principle of tolerance towards all religious and philosophical convictions—and is thus strictly obliged to impart objective, reasonable, and truthful information. The author gives some examples of discriminatory behaviour by the Institute, *inter alia* regarding Jehovah's witnesses and FOREF, which have been dealt with in one of its annual reports. Irrespective of such incidents, considered as a whole—as far as I could observe—the staff of the *Bundesstelle* tries to act with caution and self-restraint.

1 BGBl I 1998/150. For more information, see Kalb, Potz, and Schinkele 1999.

In his paper "On Dealing with Religious Minorities exemplified by New Religious Movements" (pp. 27-42), Peter Schulte first looks at different advisory centres on 'sects', be they state or private, including those run by churches. He criticises that these institutions usually advise on the basis of common societal and socio-political assumptions—or even insinuations—by making reference to long-standing knowledge that has been in circulation for over 30 years. The author underlines that, at the latest, since the time that the above-mentioned Federal Law concerning the Establishment of a Documentation and Information Office for Sect Affairs [Federal Office for Sect Affairs] has been put into force, the use of the term 'sect' in connection with a specific group may indicate defamation, which is why restraint should be exercised. Additionally, Schulte complains about the small number of publications on the topic and calls for a quality enhancement of the relevant research. In this context, he primarily criticises that scholarly investigations that go beyond a theological apologetic and place the focus on observable sociological and psychological factors are not sufficiently taken into account. Nonetheless, he finally makes a rather optimistic prognosis, especially from a sociological perspective, by reckoning that processes of differentiation and specialisation within society will also be extended to the religious and ideological sphere.

The following three contributions are dedicated to the new European anti-discrimination law (based on the European Directive 2000/78/EC) from an Austrian perspective, which establishes a general framework for equal treatment in employment and occupation (*inter alia*) irrespective of a person's religion or belief.[2] In her paper "The Prohibition of Discrimination at the Working Place" (pp. 43-56), Michaela Windisch-Graetz—starting from some basic information on the implementation of the aforementioned Directive—discusses the significance of the exemption clause found in § 20 section 2 *GlBG* (*Gleichbehandlungsgesetz* or Equal Treatment Act, *BGBl* I 2004/66 as amended), by taking the most essential parts of Article 4 section 2 of the European Directive 2000/78/EC practically word for word. As such, a difference of treatment based on a characteristic related (in our context) to religion or belief shall not constitute discrimination where—by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out—such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. In this respect, she mainly deals with questions concerning religiously motivated clothing, such

2 For more information, see the papers given at the symposium on *Religionsrechtliche Fragen des neuen Gleichbehandlungsrechts in europäischer Perspektive*, published in Kalb, Potz, and Schinkele 2008.

as the Islamic headscarf or the Sikh turban, and with time taken off from work for religious reasons and religious holidays. Her statement that, in each individual case, a fair balance between the conflicting legal positions concerned—the entrepreneurial-organisational need for optimal trouble-free production and the employee's interest in a working place free of discrimination—must be reached should be particularly emphasised. Thus, a process of weighing all facts and merits must be carried out in strict accordance with the principle of proportionality. With regard to the co-workers, the negative dimension of religious freedom must also be taken into consideration, which is discussed in context with a Supreme Court's decision frequently referred to in the case law as well as in the relevant literature.[3] This case—in which a Muslim employee had been dismissed for worshipping daily in the presence of other employees, using a carpet and other religious objects for praying, which he did quite loudly and in a manner which attracted attention—might be deemed exemplary with regard to the challenges the new anti-discrimination law has to cope with. Windisch-Graetz underlines that positions already taken in favour of a religious employee before the new Equal Treatment Law had been put into force must be all the more applicable since then.

As far as religious holidays and free time off work for fulfilling religious duties is concerned, reference is made to § 7 section 3 of the Act on Rest from Work (Arbeitsruhegesetz [Working Breaks Act], BGBl 1983/144 as amended), according to which Good Friday is a holiday only for members of the Protestant Church, the Old-Catholic Church, and the Evangelical Methodist Church. This special form of protection of religious minorities has been called into question with regard to the European anti-discrimination law because of possible implications of preferential treatment of those churches. It has partly been legitimised as a positive measure in the sense of Article 22 of the Directive 2000/78/EC, as a form of 'balancing' for structural discriminations against religious minorities, which is considered to be doubtful in the author's view. Altogether, the implementation of this Directive has resulted in an ongoing general public debate of how a certain degree of protection of their religious holidays can be extended to other religious communities, especially regarding the rights of Jewish and Muslim employees that are not explicitly legally protected.

Finally, Windisch-Graetz makes reference to the well-known decision of the European Court in the *Prais vs European Council* Case as well as to a few relevant Strasbourg judgments. In this respect, it should be mentioned

3 The decision of the Supreme Court from 27 March 1996, 8 ObA 18/96, having confirmed the dismissal was partly criticised in the literature.

that the ECHR has recently somewhat modified its view on the protection of religious freedom of employees: when an individual complains of a restriction on freedom of religion in the workplace, rather than reasoning that the possibility of changing jobs would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.[4]

In her paper "Legal Protection against Discrimination on Grounds of Religion" (pp. 57-89), Silvia Ulrich first complains about the fact that the supply of goods and other services, such as housing accommodation, are not included. In a short introduction she informs the reader about the legal consequences of discrimination against employees. Regarding access to employment, there is no obligation to enter into a contract, but claims may be made for compensation for damage or loss of property, as well as for personal encroachment. In disputes, the alleged discrimination must be substantiated by prima facie evidence. After weighing all facts and merits of the case, the respondent must prove that another credible motive was the decisive factor in the unequal treatment, or confirm the existence of legal justification (§ 26 section 12 *GlBG*). Termination or dismissal of employment on the grounds of religion or belief may be appealed against in court. Her focus is placed on the instruments of individual judicial protection—including the arbitration bodies, such as the Equal Treatment Commission and the Office of the Ombudsman for Equal Treatment established alongside the labour and the civil courts—which, as a whole, are deemed quite comprehensive. However, with regard to the courts' redress, be it in the form of actions for a declaratory judgment or actions to enforce a claim, Ulrich observes some deficiencies. She primarily points out that a class action lawsuit in the case of discrimination against relating to a certain group has been discussed but unfortunately not implemented eventually. Furthermore, she criticises that legal sanctions under public law are not efficient enough, especially with regard to infringements of the obligation to give notice of vacancies in a gender-neutral way.

Damaris Schwebisch informs the reader about "Selected Case Law Concerning Discrimination on Grounds of Religion" (pp. 91-105). Even until today, very little case law has been developed in any of the Austrian courts.[5] That is the reason why Schwebisch deals exclusively with decisions of the Federal Equal Treatment Commission, the proceedings of which are intend-

4 ECHR January 15, 2013, 48.420/10, 59.842/10, 51671/10, 36516/10 (Eweida and others / United Kingdom).

5 Hitherto only two highest courts' decisions had to deal with the quite disputed question of whether political convictions are included in the scope of protection (OGH February 24, 2009, 9 ObA 122/07t, VwGH May 15, 2013, 2012/12/0013).

ed as mediation between employers and employees in advance of legal proceedings. The facts of the cases discussed are related to the wearing of the Sikh *kirpan* and the Islamic headscarf, as well as to the disclosure of religious beliefs (Jehovah's witnesses) required on the occasion of an interview for employment. These issues also seem to be quite representative when viewed from a current perspective, in particular regarding the Islamic headscarf. The case in question concerned the rejection of a Muslim woman's application to work as a seamstress based on the argument that the headscarf might become entangled with the machine, which was considered to be in concordance with the prohibition of discrimination. In another case, the exclusion of a Sikh participant from a training course for security reasons because he was wearing a *kirpan* was also regarded as justified by the Equal Treatment Commission, despite the impending loss of his benefits. In this context, however, it should be emphasised that in the overwhelming majority of cases, infringements of the Equal Treatment Act were observed and have been resolved through compensation payments recommended by the Commission for Equal Treatment.[6]

Finally, Yvonne Schmidt deals with "Discrimination on Grounds of Religion in the Perspective of International Legal Documents as well as of Governmental and Non-Governmental Organisations" (pp. 107-181). She calls her goal an "analysis and detailed presentation of selected international legal sources" (p. 107), including regional European perspectives. However, this challenging task, especially as far as an analysis is concerned, can hardly be met given the abundance of related documents and other sources. Thus, her contribution mainly consists of the central relevant texts in the legal documents—which have quite different binding character—and an extensive enumeration of contextual home-pages. Altogether, it contains fairly comprehensive information, albeit without going into depth. In the Annex (pp. 166-181) there is a bibliography, a list of legal sources, final declarations, working papers, and the like on the topic in question.

Overall, the present volume does give certain basic information on the legal status of religious minorities in Austria, especially concerning New Religious Movements, as well as on the anti-discrimination law on grounds of religion. It will primarily be of value to readers who are not familiar with or versed in these legal fields. This applies all the more in respect to the general complexity of the new anti-discrimination law, from both a European and national perspective. Especially with regard to the dynamics of the legal area in question, the reader must take into consideration the chrono-

6 Cf. https://www.bmbf.gv.at/frauen/gleichbehandlungskommissionen/index.html (accessed: November 14, 2016).

logical distance between the year of publication of the symposium proceedings and the present review.

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